Joro Walker, USB #6676
David Becker, USB #11037
WESTERN RESOURCE ADVOCATES
425 East 100 South
Salt Lake City, Utah 84111
Telephone: 801.487.9911
Fax: 801.486.4233
Attorneys for Utah Chapter of the Sierra Club

BEFORE THE UTAH AIR QUALITY BOARD

In Re: Approval Order – the Sevier Power Company 270 MW Coal-Fired Power Plant, Sevier County Project Code: N2529-001 DAQE-AN2529001-04	:	SIERRA CLUB'S RESPONSE IN SUPPORT OF MOTIONS OF UPHE AND NPCA TO APPEAR AS AMICI CURIAE
In Re: Approval Order – PSD Major Modification to Add New Unit 3 at Intermountain Power Generating Station, Millard County, Utah Project Code: N0327-010 DAQE-AN0327010-04	:	

The Utah Chapter of the Sierra Club ("Sierra Club") respectfully submits this response in support of the motions of the Utah Physicians for a Healthy Environment ("UPHE") and the National Parks Conservation Association ("NPCA") to participate as amici curiae in the above captioned proceedings. The Sierra Club supports the participation of UPHE and NPCA because Utah's doctors and the preeminent national voice for the National Parks can provide the Board with unique perspectives and information relevant to the issues raised in these proceedings that will assist the Board in its deliberations.

The major issues in both proceedings are whether the Utah Division of Air Quality ("DAQ") properly set emissions limits for various air pollutants in the Sevier

Power Company ("SPC") and Intermountain Power Service Company ("IPSC") Approval Orders. As shown by the list of proposed conditions at the end of this Response, the Sierra Club generally agrees with the Executive Secretary's list – with the crucial exception of the limitations on the amici's right to introduce information beyond the administrative record. Such a restriction is fundamentally incompatible with the purpose of an amicus brief, as demonstrated by the law and practice of the Utah Supreme Court, United States Supreme Court, and federal Courts of Appeals. The Board should not unduly restrict the information which amici can present in their briefs.

The two cases the Executive Secretary cites in its Response do not support her contention that the Board should prevent amici from submitting factual information outside the record. Rather, these cases stand for the principle that amici may not ask the Board to decide issues that are not raised in the Sierra Club's amended Requests for Agency Action. For example, in State v. Green, the amicus tried to argue that Utah's bigamy statute violated constitutional rights to free speech, privacy, and free association – which defendant Green himself never raised. State v. Green, 99 P.3d 820, 829 (Utah 2004). By contrast, in these air permit cases, the concerns that amici want to address – the potential effects of pollution from these plants on human health and the environment – are directly relevant to the existing claims. See, e.g, Sierra Club Second Amended Request for Agency Action in SPC at 4, 8 ("Consideration of inherently lower emitting power production processes and techniques such as IGCC is required"; "the Sevier Power Company plant will contribute to violations of the Class I SO_2 increment … in Capitol Reef National Park"); Sierra Club Second Amended Request for Agency Action in IPSC at 5, 8 ("proper consideration of economic, environmental and energy impacts confirms

that IGCC is BACT"; "failure to include coal chemistry data prevents an accurate determination of percent removal efficiency limits, short term emission rates, and total mass emissions of pollutants such as mercury").

Indeed, the Utah Supreme Court routinely accepts information from amici curiae that is not in the record. See, e.g. In re Young, 976 P.2d 581, 583 (Utah 1999) (describing "historical materials provided us by the amici" that had not been presented in the original proceeding). The United States Supreme Court describes additional factual information provided by amicus curiae briefs as "valuable" and "of considerable help." See, e.g., Clinton v. City of New York, 524 U.S. 417, 448 (noting that "[t]he excellent briefs filed by the parties and their amici curiae have provided us with valuable historical information that illuminates the delegation issues"); United States Supreme Court Rule 37(1) ("An amicus curiae brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court.").

The United States Court of Appeals for the Seventh Circuit has stated that the criteria for an amicus brief should be "whether the brief will assist the judges by presenting ideas, arguments, theories, insights, facts, or data that are not to be found in the parties' briefs." Voices for Choices v. Illinois Bell Telephone Co. 339 F.3d 542, 545 (7th Cir. 2003). These criteria are more likely to be satisfied when "the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide." Id. The amici cannot be limited to the administrative record and still perform the function which amici curiae, with their unique perspectives, are supposed to offer – namely "articulating a distinctive perspective or presenting specific

information, ideas, arguments, etc. that go beyond what the parties whom the amici are supporting have been able to provide." Id.

Indeed, what the Executive Secretary is suggesting would completely defeat the purpose of anyone ever appearing as an amicus curiae – amici are supposed to present facts based their unique perspectives and other information that the parties have not, to aid the adjudicator in making its decision. As the U.S. Court of Appeals for the Sixth Circuit has noted, "amicus curiae" is "defined as one who interposes 'in a judicial proceeding to assist the court by giving information, or otherwise, or who conduct[s] an investigation or other proceeding on request or appointment therefore by the court.' Its purpose was to provide *impartial* information on matters of law about which there was doubt, especially in matters of public interest." United States v. Michigan, 940 F.2d 143, 164 (6th Cir. 1991) (emphasis added, italics in original, citations omitted); see also Voices for Choices, 339 F.3d at 545; National Organization for Women, Inc. v. Scheidler, 223 F.3d 615, 616-17 (7th Cir 2000); Ryan v. CFTC, 125 F.3d 1062, 1063 (7th Cir. 1997).

In the face of the authority from Utah's highest court and the leading federal courts, the precedential value of the Price case, cited by the Executive Secretary, is minimal at best. The Board should be aware that the "New York Supreme Court" is actually the lowest court in New York State, the equivalent of a Utah district court – and therefore of almost no persuasive authority. The statements in the Price case from the "New York Supreme Court" should be taken for what they are – the ruling of a single trial-court judge, not a convincing statement from that state's highest court and certainly not reasoning sufficient to overcome the holdings of the many, much more authoritative courts cited above.

In addition, it is critical to note that the New York trial court judge in Price cited no cases at all – including none from New York State's highest court (the New York Court of Appeals) – for his position that an amicus curiae could not submit additional factual information not in the record. And even then, the New York trial judge noted that it is a proper function of amicus briefs to describe "unpresented implications to persons not parties to the action." Price 837 N.Y.S.2d 507, 516 (N.Y. Sup. Ct. 2007). Who better than Utah's doctors to describe the implications of pollution emission levels on Utahns' health? Who better than NPCA to describe implications of power plant emissions on Utah's National Parks? The amicus curiae practice of Utah's Supreme Court, the United States Supreme Court, and the federal Courts of Appeals – not the opinion of a single trial judge in Manhattan – should influence this Board's decision on the scope of the amici's briefs. Ultimately, because the information and perspective that these amici groups seek to provide will assist the Board in making an informed decision that considers all available and credible facts, the Board will be well served to allow UPHE and NPCA to submit additional material as part of their participation in this matter.

The Sierra Club agrees with the Executive Secretary that the Board will not consider, directly, in these proceedings, whether the current ambient air quality standards are adequate. However, the Executive Secretary herself has raised the issue of what standard for at least one pollutant – mercury – would apply if the Board remands the Approval Orders to DAQ for additional proceedings. Since DAQ approved the Approval Orders ("AOs"), the federal government has loosened the national standard for allowable mercury emissions from coal-fired power plants. DAQ has represented that it might be

forced to allow the plants to emit more mercury than in the current AOs if the Board remands this matter – even if this is potentially more harmful to human health.

At the same time, the Board has begun a scientific study process to determine whether Utah should have more stringent limits for pollutants such as mercury – a process begun at the request of the UPHE. Therefore the issue of what should be the proper standard for mercury emissions, in the event of a remand, will absolutely be a consideration for the Board in these proceedings. UPHE's input on the health effects of mercury is therefore directly relevant to an issue that the Executive Secretary has already raised, and does not go beyond any issue raised by the parties.

The Sierra Club supports the motions of UPHE and NPCA to submit amicus curiae briefs in the SPC matter subject to the following conditions, which – with the exception of condition number 2 – are substantially the same as those proposed by the Executive Secretary.

1. UPHE and NPCA each may submit one brief, limited to 15 pages.

2. The amici are not limited to the administrative record but may present any facts or unique perspectives that are relevant to the issues raised by the parties to these proceedings, including facts related to the effects of pollution emissions on human health and the environment.

3. The amici may not request that Board take action on issues that the parties have not raised, and any arguments raised by the amici must be germane to the issues already raised by the parties to these proceedings.

4. No oral argument will be permitted by amici. The Sierra Club may (at its discretion) cede a portion of the oral argument time allocated to the Sierra Club for argument by UPHE or NPCA.

5. The amici may not call or question witnesses.

Dated: August 31, 2007

DAVID BECKER

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of August, 2007, I caused a copy of the foregoing Sierra Club's Response in Support of Motions by UPHE and NPCA to Appear as Amici Curiae to be emailed to:

Fred G. Nelson
Counsel, Utah Air Quality Board
160 East 300 South, 5th Floor
Salt Lake City, Utah 84114
fnelson@utah.gov

Christian Stephens
Paul McConkie
Assistant Attorneys General
150 North 1950 West
Salt Lake City, Utah 84114
cstephens@utah.gov
pmcconkie@utah.gov

Fred Finlinson
11955 Lehi-Fairfield Road
Saratoga Springs, Utah 84043
f2fwcrf@msn.com

Intermountain Power Service Corporation
850 Brush Wellman Road
Delta, Utah 84624
brian-c@ipsc.com

Michael Keller
Matthew McNulty
VanCott Bagley
50 South Main, Suite 1600
Salt Lake City, Utah 84114
mkeller@vancott.com
mmcnulty@vancott.com

Joel Ban #10114
Ban Law Office PC
1399 S. 700 E. Ste. 3
Salt Lake City, Utah 84105
joel.ban@gmail.com

Martin Banks
Stoel Rives
201 West Main, Suite 1100
Salt Lake City, Utah 84111
mkbanks@stoel.com

Michael Jenkins
PacifiCorp
201 South Main, Suite 2200
Salt Lake City, Utah 84111
michael.jenkins@pacificorp.com

Brian Burnett
Callister Nebeker
10 East South Temple, Suite 900
Salt Lake City, Utah 84133
brianburnett@cnmlaw.com

James O. Kennon, pro se
Dick Cumiskey, pro se
Representing themselves and the
Members of Save Our Air & Resource
146 North Main Street, Suite 27
P.O. Box 182
Richfield, Utah 84701
sccaw@yahoo.com

Kathryn Collard
THE LAW FIRM OF KATHRYN
COLLARD, LC
4265 South 1400 East, Suite A
Salt Lake City, Utah 84124
kathryncollard@gmail.com

DAVID BECKER